NO. SC84246

IN THE SUPREME COURT OF MISSOURI
AT JEFFERSON CITY

STATE OF MISSOURI,

Respondent,

v.

PATRICK LARSON,

Appellant.

APPEAL FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY, MISSOURI
TWENTY-FIRST JUDICIAL CIRCUIT, DIVISION XV
THE HONORABLE JOHN ROSS, JUDGE

RESPONDENT'S SUBSTITUTE STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

This is an appeal from the denial of appellant's Rule 29.07 motion to set aside a guilty plea in the Circuit Court of St. Louis County. The guilty plea sought to be set aside was for two counts of sexual abuse in the first degree, §566.100, RSMo. 2000, for which appellant's sentence was suspended and appellant was placed on probation for a period of five years. The Court of Appeals, Eastern District, dismissed appellant's appeal for lack of jurisdiction in State v. Larson, No. ED79250 (Mo. App., E.D. December 4, 2001). This Court now has jurisdiction because the Eastern District, on its own motion, transferred this case to this Court pursuant to Supreme Court Rule 83.02. Article V, §10, Missouri Constitution (as amended 1982).

STATEMENT OF FACTS

Appellant, Patrick Larson, was charged in the Circuit Court of St. Louis County with two counts of sexual abuse in the first degree (L.F.9-10)[1]. The indictment alleged that between January 1989, and December 1990, appellant subjected M.T. and R.T., who were less than twelve years old, to sexual contact (L.F. 9-10). Appellant was between the age of fifteen and sixteen at the time of the commission of the crimes (L.F. 9-10). On October 22, 1997, the juvenile court adjudicated appellant, who was then twenty three years old, to be tried as an adult (Supp. L.F.1-4).

On October 16, 1998, appellant appeared before the Honorable Robert L. Campbell and entered a plea of guilty to both counts of the indictment (Guilty Plea Tr. 1). The court examined appellant and found that appellant's plea was voluntary and intelligent (Guilty Plea Tr. 4). The court accepted appellant's plea of guilty and suspended the imposition of appellant's sentence, placing appellant on probation for period of five years (L.F. 3, 24, Guilty Plea Tr. 5).

On January 19, 2001, appellant filed a "Motion to Vacate and Set Aside Judgment of Conviction" (L.F. 26-28). On March 2, 2001, the court denied appellant's motion without a hearing (L.F. 39). On March 12, 2001, appellant filed a notice of appeal with the Court of Appeals, Eastern District (L.F. 4, 40-41). On May 17, 2001, the Court of Appeals issued

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[1]The record on appeal consists of a legal file (L.F.), a supplemental legal file (Supp. L.F.), and a transcript from the guilty plea (Guilty Plea Tr.).

an order to show cause as to why his appeal should not be dismissed (E.D. Order May17, 2001). In its order, the Court of Appeals stated that appellant's motion to "Vacate and Set Aside Judgment of Conviction" cites to no Supreme Court Rule authorizing the motion. The Court of Appeals further noted that the imposition of appellant's sentence was suspended and ordered appellant to show a cause why his appeal should not be dismissed for lack of final appealable judgment.

On June 7, 2001, appellant responded to the court's order claiming that his motion was filed under Supreme Court Rule 29.07 and alleged that the Court of Appeals had jurisdiction to review the plea court's order denying appellant's motion to withdraw his guilty plea because appellant was still on probation and under the jurisdiction of the plea court, and that therefore, the Court of Appeals had jurisdiction to review the plea court's denial. In support, appellant cited State v. Kluttz, 813 S.W.2d 315 (Mo. App., E.D. 1991), an opinion issued after this Court's decision in State v. Lynch, 679 .W.2d 858 (Mo. banc 1984), in which the Court of Appeals, Eastern District, reviewed the merits of a claim of a wrongful denial of a motion to withdraw guilty plea despite that the imposition of defendant's sentence was suspended.

On June 11, 2001, the Court of Appeals issued an order stating that State v. Kluttz, supra, did not appear to be viable after the Court of Appeals' decision in State v. Shamley-Bey, 989 S.W.2d 681 (Mo. App., E.D. 1999). (E.D. Order June 6, 2001). The Court of Appeals further noted that "[i]f the trial court had jurisdiction to rule on appellant's motion to vacate, and set aside judgement or conviction, appellant may have remedy, but it is not by

appeal." The Court of Appeals ordered appellant to address the jurisdictional issue in the jurisdictional portion of his brief (E.D. Order June 6, 2001).

In the jurisdictional statement of his brief, appellant asserted that Shamley-Bey was not applicable because the opinion in Shamley-Bey noted that "the trial court appears to have suspended movant's probation," while in the case at bar appellant's probation had not been suspended (App. Br. 4). State v. Shamley-Bey, 989 S.W.2d 681.

On December 4, 2001, the Court of Appeals dismissed the appeal for lack of jurisdiction, finding as follows:

> Partick Larson ("Appellant") appeals from the denial of his Rule 29.07 motion to set aside a plea of guilty in the Circuit Court of St. Louis County. The guilty plea sought to be set aside was for two counts of sexual abuse in the first degree. The plea court suspended imposition of sentence and placed Appellant on probation for a period of five years.
>
> Appeal in Missouri is limited to cases of final judgment. State v. Lynch, 679 S.W.2d 858, 859 (Mo. banc 1984). In criminal cases, there is no final judgment until sentence is entered. Yale v. City of Independence, 846 S.W.2d 193, 194 (Mo. banc 1993); Lynch at 860. Accordingly, a suspended imposition of sentence is not a final judgment for the purposes of appeal. Id. Nonetheless, Appellant argues that appellate jurisdiction still attaches because, in addition to the suspended imposition of sentence, he was also placed on probation. This argument fails because probation is not part of the

sentence. State v. Williams, 871 S.W.2d 450, 452 (Mo. 1994); McCulley v. State, 486 S.W2d 419, 423 (Mo. 1972). Therefore, the fact that Appellant was on probation has no bearing on whether there is a final judgment supporting appellate jurisdiction.

Appeal dismissed.

State v. Larson, No. ED79250 (Mo. App., E.D. December 4, 2001).

On February 1, 2002, the Court of Appeals transferred the present case to this Court on its own motion pursuant to Supreme Court Rule 83.02. The court's order stated as follows:

This Court issued an opinion on December 4, 2001 dismissing appellant's appeal from the denial of motion to withdraw a guilty plea for lack of final, appealable judgment.

On November 20, 2001, the Western District issued an opinion in State v. Fensom, WD59302 which is in conflict with this Court's opinion in Larson. On January []17, 2002, this Court issued an order transferring State v. Saffaf, ED78832 to the Supreme Court. Saffaf dealt with issues nearly identical to those in Larson. Furthermore, in the transfer order, the Saffaf court noted that State v. Davis, 438 S.W.2d 232 (Mo. 1969), holds that a motion to withdraw a guilty plea is a civil action and is therefore governed by the rules of civil procedure. Id. at 234.

> On this Court's own motion, pursuant to Rule 83.02, this case is transferred to the Missouri Supreme Court because of general interest or importance of the question involved and for the purpose of reexaming existing law. The appellant's Motion for Rehearing and/or Transfer to the Missouri Supreme Court is denied as moot.

(E.D. Order February 1, 2002). As a result of this order, the instant case is now before this Court.

ARGUMENT

I.

THIS APPEAL SHOULD BE DISMISSED FOR LACK OF APPEALABLE JUDGEMENT BECAUSE THERE IS NO FINAL JUDGMENT FROM WHICH AN APPEAL CAN BE TAKEN IN THAT THE COURT SUSPENDED THE IMPOSITION OF APPELLANT'S SENTENCE AND PLACED HIM ON PROBATION FOR FIVE YEARS. A FINAL JUDGMENT IS REQUIRED IN APPELLANT'S CRIMINAL CASE BEFORE APPELLANT MAY APPEAL THE DENIAL OF HIS MOTION TO WITHDRAW HIS GUILTY PLEA.

Appellant requests an appeal from the denial of his Rule 29.07 (d) motion to withdraw his guilty plea.

Factual Background

On October 16, 1998, appellant pled guilty to two counts of sexual abuse in the first degree in the Circuit Court of St. Louis County and was placed on probation for five years with imposition of his sentence suspended (L.F. 3, 24, Guilty Plea Tr. 1-5). On January 19, 2001, appellant filed a "Motion to Vacate and Set Aside Judgment of Conviction" (L.F. 26-28). The court denied appellant's motion without a hearing (L.F. 39). On March 12, 2001, appellant filed a notice of Appeal with the Court of Appeals, Eastern District (L.F. 4, 40-41). On December 4, 2001, the Court of Appeals dismissed the appeal for lack of jurisdiction, finding as follows:

> Partick Larson ("Appellant") appeals from the denial of his Rule 29.07 motion to set aside a plea of guilty in the Circuit Court of St. Louis County. The guilty plea sought to be set aside was for two counts of sexual abuse in the

first degree. The plea court suspended imposition of sentence and placed Appellant on probation for a period of five years.

Appeal in Missouri is limited to cases of final judgment. State v. Lynch, 679 S.W.2d 858, 859 (Mo. banc 1984). In criminal cases, there is no final judgment until sentence is entered. Yale v. City of Independence, 846 S.W.2d 193, 194 (Mo. banc 1993); Lynch at 860. Accordingly, a suspended imposition of sentence is not a final judgment for the purposes of appeal. Id. Nonetheless, Appellant argues that appellate jurisdiction still attaches because, in addition to the suspended imposition of sentence, he was also placed on probation. This argument fails because probation is not part of the sentence. State v. Williams, 871 S.W.2d 450, 452 (Mo. 1994); McCulley v. State, 486 S.W2d 419, 423 (Mo. 1972). Therefore, the fact that Appellant was on probation has no bearing on whether there is a final judgment supporting appellate jurisdiction.

Appeal dismissed.

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On this Court's own motion, pursuant to Rule 83.02, this case is transferred to the Missouri Supreme Court because of general interest or importance of the question involved and for the purpose of reexaming existing law. The appellant's Motion for Rehearing and/or Transfer to the Missouri Supreme Court is denied as moot.

(E.D. Order February 1, 2002).

Analysis

In Missouri the right to appeal is purely statutory as no such right existed in common law. State v. Lynch, 679 S.W.2d 858, 859 (Mo. banc 1984). This right is granted only after a final judgement is entered in both civil and criminal cases. Pulitzer Publ'g Co. v. Transit

Casualty Co., 43 S.W.3d 293, 298 (Mo. banc 2001), Williams v. Williams, 41 S.W.3d 877, 878 (Mo. banc 2001); State v. Burns, 994 S.W.3d 941, 942 (Mo. banc 1999). A final judgment is defined as one that resolves all issues in the case, leaving nothing for future determination. State v. Eisenhouer, 40 S.W.3d 916, 918 (Mo. banc 2001); Strickland v. Strickland, 941 S.W.2d. 866, 867 (Mo. App., S.D. 1997). In a criminal case, judgment is final when there is a sentence imposed. State v.Lynch, supra at 862; Yale v. City of Independence, 846 S.W2d 193, 194 (Mo. banc 1993).

A. Appellant must wait for a final judgment in his criminal case before he can appeal from the denial of his motion to withdraw his guilty plea

In the present case, appellant's sentence was suspended and there is no final judgment for purposes of appeal. State v.Lynch, 679 S.W.2d at 862. However, in its transfer order, the Court of Appeals, Eastern District, raised the issue of whether the denial of a motion to withdraw a guilty plea is an appealable order without the need that the judgment in the underlying criminal case be finalized for purposes of appeal (E.D. Order February 1, 2002). The respondent submits that appellant is required to wait for final judgement in his criminal case before he can appeal the denial of his motion to withdraw his guilty plea.

While a Rule 29.07 motion is civil in its nature, because it is filed during the pendency of a criminal case, the court's ruling on such motion should not be treated separately from the underlying criminal case. The language of Rule 29.07(d) expressly provides that:

> A motion to withdraw a plea of guilty may be made only before sentencing is imposed or when the imposition of sentence is suspended; but to correct manifest in justice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

Supreme Court Rule 29.07(d).

Thus, Rule 29.07 does not contemplate a separate treatment of a motion to withdraw outside the criminal case in which it is filed. The fact that appellant's motion was filed under the same cause number, "97CR-7281," and was styled under the same name "State of Missouri v. Patrick Larson" indicates that the motion is an integral part of the criminal case (L.F. 29). Furthermore, there is no reason to distinguish appellant's Rule 29.15 motion from any other motion that could have been filed in the criminal case and would have been considered a part it, such as a motion for continuance or a motion to change a venue. Another indication that the motion to withdraw a guilty plea is necessarily intertwined with the criminal case is the fact that appellant was not entitled to a separate treatment for the purposes of litigating this particular motion; for example, he was not entitled to a separate counsel simply because he has filed a Rule 29.07 motion.

An analogy can be drawn from the relationship between a civil motion seeking an order for declaring criminal records closed and the underlying criminal case in which it is filed. In State v. Bachman, 675 S.W.2d 41 (Mo. App., W.D. 1984), the Court of Appeals, Western District, reviewed a claim of whether the trial court may rule on a motion to close

criminal records when the underlying criminal case in which it was filed had been closed.[2] The Court of Appeals examined the record in the criminal case and noted that the motion was filed under the same case number as the criminal case and determined that the parties and the court considered the motion "a part of, perhaps ancillary to, the criminal proceedings." Id. at 43. The Court of Appeals held that the trial court may not rule on the civil motion after discharging the defendant from probation and closing the criminal case. Id. at 43-44, 48.

Similarly, in the present case the ruling on appellant's motion to withdraw his plea of guilty, was filed and treated as a part of appellant's criminal case. By its very nature, this motion was so connected to the criminal case in which it was filed, that it became a part of it and it cannot be appraised separately from the underlying criminal case. In addition, the ruling on appellant's motion to withdraw a guilty plea does not necessarily resolve all issues in the plea, and therefore, it should not be treated separately from the criminal proceedings in which it is filed.

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[2] The defendant in Bachman, 675 S.W.2d 41 was sentenced to three years of imprisonment, with suspended execution of sentence and placed on probation for five years. Id. at 42-43. The court discharged the defendant from probation after two years. Id. The defendant filed a motion for order declaring his criminal records closed three years after the judgment in the criminal case became final. Id.

This analysis is further supported by examination of the federal law governing appeals from a motion to withdraw a plea of guilty. The language of Rule 29.07(d) is similar to the language of Rule 32(e) of the Federal Rules of Criminal Procedure, which regulates the motion to withdraw a guilty plea.[3] In applying this similar language, the federal courts have refused to allow an appeal from a motion to withdraw a guilty plea where there is a suspended imposition of sentence. In United State v. Gottlieb, 817 F.2d 475 (8th Cir. 1987), the Court of Appeals for the Eighth Circuit, held that the defendant may not appeal from the denial of his motion to withdraw his guilty plea from a suspended imposition of sentence because the ruling on the motion to withdraw his plea was not a final judgement and therefore the defendant was required to wait until the plea court entered a final judgment and sentence to bring an appeal. Likewise, in Okansen v. United States, 362 F.2d 74 (8th Cir. 1966), the Court of Appeals for the Eighth Circuit noted that the final judgment in the underlying criminal case is what made the otherwise unappealable, interlocutory motion to withdraw a plea of guilty, a final, appealable judgment. Id at 76.

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[3]Rule 32(e) reads: "Plea withdrawal. If a motion to withdraw a plea of guilty or nolo contendere is made before sentence is imposed, the court may permit the plea to be withdrawn if the defendant shows any fair and just reason. At any later time, a plea may be set aside only on direct appeal or by motion under 28 U.S.C.§2255." Fed.R.Crim.P. 32(e).

Similarly, under the Missouri law, a ruling on a motion to withdraw a guilty plea under Supreme Court Rule 29.07(d) is not a final, appealable judgement disposing all issues in the criminal case in which it is filed, and a claim of a wrongful denial of such motion should be pursuit only after all issues are resolved in the criminal case and a final judgement is issued.[4]

B. Appellant is not entitled to appeal from his suspended imposition of sentence despite the fact that collateral consequences have attached as a result of his guilty plea

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[4]In his brief, appellant relies on State v. Kluttz, 813 S.W.2d 315 (Mo. App., E.D. 1991), where the Court of Appeals, Eastern District, reviewed the merits of a claim of wrongful denial of a motion to withdraw a guilty plea from a suspended imposition of sentence. Kluttz is not controlling here. In Kluttz, neither of the parties nor the court addressed the issue of appealability of a motion to withdraw a guilty plea before imposition of a sentence, and this case, at the most, stands for the proposition that the issue of appealability could be overlooked. Appellant also cites to State v. Fensom, No. WD59302 (Mo. App., W.D. November 20, 2001), in which the Court of Appeals, Western District, misinterpreted the existing law to allow an appeal from an order denying a motion to withdraw where there is no sentence is imposed. slip op.2-3. However, on March 5, 2002, the Court of Appeals, Western District, reconsidered the matter and issued an opinion dismissing Fensom's appeal for lack of final appealable judgment. State v. Fensom, WD59302 (Mo. App., W.D. March 5, 2002).

Appellant claims that he should be allowed to initiate an appeal because by virtue of pleading guilty to two counts of sexual abuse, he suffered collateral consequences equal to those of a conviction in that he was allegedly required to register as a sex offender (App. Br. 16).

Appellant's contention is contrary to this Court's holding in State v. Lynch, 679 S.W.3d 858 (Mo. banc 1984). In Lynch, this Court discussed how some statutory provisions may attach the stigma of conviction to a defendant despite that the imposition of the sentence was suspended, but it declined to establish a new rule allowing an appeal from a suspended imposition of sentence for defendants who have been stigmatized. Id at 861-862. This Court held that "Right of appeal in criminal cases is limited by statute to final judgments. This Court should not, indeed due to constitutional restraints, establish some new rule pertaining to rights of appeal which would be contrary to extant statutory authority." Id. at 862 (Internal citations omitted). This Court further noted that the "defendant may request the trial court to impose a sentence, e.g. a suspended execution of sentence, and thereby have his final appealable judgment. Remedial legislation by the General Assembly is another course available." Id. n.1.

More recently, the Court of Appeals, Southern District, applied the rationale of Lynch and declined to permit an appeal from a suspended imposition of sentence where the defendant claimed that he was burdened by the costs assessed against him. State v. Hurston, 42 S.W.3d 843 (Mo. App., S.D. 2001), cert. denied 122 S.Ct. 463 (2001).

Appellant, wishing to avoid the possibility of two consecutive terms of five years of imprisonment, pled guilty in the Circuit Court of St. Louis County and accepted a suspended imposition of sentence (Guilty Plea Tr. 1-5, L.F. 24). Appellant did not request that the court impose a suspended execution of sentence, so that he could have a final, appealable judgment and therefore, he is compelled by the statutory requirement of a final judgement to await for finality in his criminal case before he can appeal from the denial of his motion to withdraw his guilty plea.

C. This Court should dismiss this appeal or lack of jurisdiction

In an attempt to circumvent the statutory requirement of a final judgement, appellant seeks review of the merits of his claim, claiming that because he is still on probation, his criminal case is still under the jurisdiction of the plea court, and that therefore, this Court should have jurisdiction to review the plea court's denial of appellant's motion (App. Br. 14-15).

Appellant's argument is without merit. As appellant admits, the matter is still before the plea court, and therefore there is still an issue left for future disposition in appellant's case. As such, appellant does not have yet the right to appeal from the denial of his motion to withdraw his guilty plea. *See* State v. Thomas 801 S.W.2d 504 (Mo. App., S.D. 1991), State v. Wakefield, 689 S.W.2d 809, 812 (Mo. App., S.D. 1985), and State v. O'Conell, 726 S.W.2d 742, 749 (Mo. banc 1987) (no appeal can be taken from matters still pending in the trial court).

Appellant's reliance on State v. Ortega, 985 S.W2d 373 (Mo. App., S.D. 1999), to justify appellate review without a final judgment is misplaced. In Ortega, the defendant filed a motion to withdraw his guilty plea *after* the completion of his probation and the plea court denied the motion. Id at 374. The defendant appealed the denial of his motion and the Court of Appeals, Southern District, dismissed the appeal, holding that the trial court lacked jurisdiction to consider the motion and had no authority to grant relief. Id

The contrary is true here. Appellant's case is still active and before the plea court. The issues in appellant's case have not been fully resolved and disposed. Because appellant's case is still pending, this Court does not have jurisdiction to review the plea court's ruling on appellant's motion to withdraw his plea, and this appeal should be dismissed for lack of jurisdiction.

II.

THE PLEA COURT DID NOT CLEARLY ERR IN DENYING APPELLANT'S RULE 29.07 MOTION BECAUSE BY ENTERING A PLEA OF GUILTY, APPELLANT WAIVED HIS CLAIM THAT THE JUVENILE COURT HAD NO JURISDICTION TO CERTIFY HIM AS AN ADULT. (In response to appellant's points I and II).

Out of an abundance of caution, should this Court choose to grant appellant the review he seeks, the respondent will address the merits of appellant's claim. Appellant's

points I and II allege that the plea court clearly erred in denying appellant's motion to set aside judgment and sentence without an evidentiary hearing as untimely filed and waived (App. Br. 11-22).

The respondent concedes that the plea court erred in finding that appellant's Rule 29.07 was untimely filed because appellant had not been delivered to the Department of Corrections, and therefore, there were no time limits for filing his motion to withdraw his guilty plea. Supreme Court Rule 29.07(d). However, even where the stated reason for a court's ruling is incorrect, the judgment should still be affirmed if the court's action is sustainable on other grounds. State v. Bradley, 811 S.W.2d 379, 383 (Mo. banc 1991). The court in the present case was correct in finding that by entering a plea of guilty, appellant waived his claim that the juvenile court had no jurisdiction to certify appellant as an adult.

A defendant who has been transferred from the jurisdiction of the juvenile court to court of general law and failed to attack the deficiencies of the juvenile court's proceedings before the circuit court waives any objection to the deficiencies of the juvenile court's proceedings. Wilkins v. State, 802 S.W.2d 491 (Mo. banc 1991), cert. denied 502 U.S. 841 (1991); State v. LePage, 536 S.W.2d 834 (Mo. App, K.C.D. 1976); Jefferson v. State, 442 S.W.2d 6, 12 (Mo. 1969). In State v. LePage, supra, the defendant claimed that the plea court had no jurisdiction because of deficiencies in the juvenile court proceedings. The court rejected the defendant's claim, applying Jefferson v. State, 442 S.W.2d 6[5], where this

[5] The defendant in Jefferson v. State claimed that his guilty plea should be vacated

Court held that "[The defendant] waived any objection he might otherwise have had to the proceedings in the juvenile court when, after the appointment of two competent lawyers and the benefit of their advice and counsel, he failed to file a motion in the general criminal division requesting dismissal of the information, or remand to the juvenile division for the conduct of a proper hearing with counsel present and the entry of order complying with the constitutional standards." Id. at 12.

Likewise, appellant in the present case waived his claim of lack of jurisdiction of the plea court based on a defect in the juvenile court's proceeding when he failed to request a dismissal of the indictment or to appeal the juvenile court's certification under §211.261, RSMo. 2000.

A further and all-inclusive waiver occurred when at the guilty plea hearing, appellant, with the advise of counsel, made no objection to the juvenile court's proceedings and entered a voluntary plea of guilty. Jefferson v. State, 442 S.W.2d at 12; State v. LePage, 536 S.W.2d at 836. Appellant was represented by an attorney at the guilty plea hearing (Guilty Plea Tr. 1-4). Appellant assured the court that he was satisfied with his counsel's performance (Guilty Plea Tr. 3). Neither appellant nor his attorney made any objection to the juvenile court's proceedings. Instead, appellant voluntarily entered a plea of guilty (Guilty Plea Tr.1-4). By entering the plea of guilty appellant waived his claim of deficiency

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because he was a juvenile at the time he was arrested, but was prosecuted under the general law without being taken to the juvenile authorities.

in the juvenile court's proceedings and the plea court was correct in finding that appellant waived his claim. Jefferson v. State, supra; State v. LePage, supra.

Accordingly, the plea court did not clearly err in denying appellant's motion without an evidentiary hearing because even though appellant's motion was timely filed, appellant's claim was waived. Therefore, appellant's points I and II should be denied.

III.

THE PLEA COURT HAD JURISDICTION TO ACCEPT APPELLANT'S PLEA OF GUILTY BECAUSE APPELLANT WAS PROPERLY ADJUDICATED TO BE TRIED AS AN ADULT IN THAT APPELLANT WAS UNDER THE AGE OF SEVENTEEN AT THE TIME HE COMMITTED THE CRIMES AND THE JUVENILE COURT HAD JURISDICTION TO CERTIFY HIM AS AN ADULT. (In response to point III of appellant's brief).

In his third point, appellant alleges that the motion court clearly erred in denying appellant's motion to withdraw his guilty plea because the plea court had no jurisdiction to accept appellant plea in that the juvenile court had no jurisdiction to certify appellant as an adult (App. Br. 23-27). Specifically, appellant claims that the juvenile court had no jurisdiction to

adjudicate him as an adult because at the of the certification hearing, appellant was twenty three years old and therefore no longer a child as defined by §§211.021(2) and 211.031(1) RSMo (App. Br. 26-27).

Section 211.031 provides in pertinent part that:

> 1. Except as provided otherwise in this chapter, the juvenile court or the family court ...shall have exclusive original jurisdiction in proceedings:
>
> (3) Involving any child who is alleged to have violated a state law or municipal ordinance, or any person *who is alleged to have violated a state law or municipal ordinance prior to attaining the age of seventeen years*, in which cases jurisdiction may be taken by the court of the circuit court of the circuit in which the or person resides or may be found or in which the violation is alleged to have occurred.

§211.031, RSMo 2000. (Emphasis added).

Appellant in the present case was between the age of fifteen and sixteen at the time of the commission of the crimes (L.F. 9-10), and therefore under the jurisdiction of the juvenile court.

In an attempt to circumvent the plain meaning of the statute, appellant argues that the juvenile court's jurisdiction is not determined by the age of the child at the time of the commission of the crime, but by his age at the time of the certification hearing (App. Br. 27). A similar claim was addressed and denied in J.O.N. v. Juvenile Officer, 777 S.W.2d 633 (Mo. App., W.D. 1989). In J.O.N., the minor claimed that the juvenile court lost jurisdiction to

adjudicate him after his seventeenth birthday. Id. at 634. In denying the minor's claim, the Court of Appeals, Western District, held that:

> The legislature's use of the word "person" in the [statute] is deliberate and significant. The statute intends to make it clear that the juvenile court has jurisdiction in proceedings involving a child (i.e., a person under 17 years of age, section 211.021(2), RSMo 1986), which is alleged to have violated a state law and also of a proceeding involving a person, regardless of age, who is alleged to have violated a state law prior to attaining the age of 17 years. The jurisdiction of juvenile court depends only upon the occurrence of the law violation before the violator was 17.
>
> Section 211.031(3) as so interpreted is in harmony with section 211.062.2, RSMo 1986, which says that when a person who is alleged to have committed an offense comes before a judge who is not juvenile judge and accused is "ascertained" to have been "under the age of seventeen at the time he is alleged to have committed the offense", then this forthwith to transferred or referred to the juvenile court. The statutory scheme contemplates that the law violator may be age 17 when he is apprehended or charged, but the juvenile court has jurisdiction if he was under 17 when the offense is alleged to have been committed.

J.O.N. v. Juvenile Officer, 777 S.W.2d at 634.

Similarly, in the present case, the juvenile court had jurisdiction to adjudicate appellant as an adult because he was under the age of seventeen when he committed the crimes, and the fact he was twenty three years old at the time of the certification proceedings was irrelevant to the determination of the juvenile court's jurisdiction. Having being properly adjudicated by a juvenile court, the plea court acquired jurisdiction to accept appellant's guilty plea and appellant's claim should be denied.

CONCLUSION

In view of the foregoing, the respondent requests that this Court dismiss appellant's appeal for lack of jurisdiction. In the alternative, should this Court choose to review appellant's claim, the respondent submits that the denial of appellant's motion under Rule 29.07 without an evidentiary hearing should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.04 and contains 5,893 words, excluding the cover, this certification and the appendix, as determined by WordPerfect 9 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses, using McAfee Anti-virus software, and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this 12th day of March, 2002, to:

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35 North Central Avenue, No. 208
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